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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND,
Petitioners,

v.

DIANA L. SPIRT, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

OBJECTIONS BY RESPONDENT DIANA L. SPIRT TO PETITION FOR WRIT OF CERTIORARI

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AS TO QUESTIONS PRESENTED

None of the questions stated by petitioners Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF") in their petition for writ of certiorari reflect any errors of law or are of sufficient importance or worthy of review by this Court, and their petition should be denied.

The judgment of the Court of Appeals for the Second Circuit does not conflict with any judgment of any other

Court of Appeals (Ques. 1) and its decision after remand by this Court for consideration in light of *Norris*[1] (103 S.Ct. 3565) shows not only "sufficient attention" to the equitable nature of the matter of retroactivity but also reflects a full consideration of its prior decision under that mandate and the applicable equitable considerations. In so doing, the Court of Appeals examined every facet of the issue and underscored its factual determination on the equitable consequences from the retroactivity and *reasons* retroactivity met all the requirements of *Norris*.

Questions 2 and 3 are repeated by petitioners TIAA-CREF from their prior petition in this action, and the mandate did not require that they again be given consideration.

Furthermore, the ruling of the Court of Appeals on the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.* (1982) ("McCarran Act") is misstated in No. 3. Any state law which would bar the application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 *et seq.* ("Title VII") was preempted but, in any event, no state law has been invalidated, impaired, or superceded, and the McCarran Act was not held to deal only with the application of federal antitrust laws.[2]

SUMMARY OF ARGUMENT

TIAA since 1918 and CREF since 1952 have been part and parcel of the higher educational system in the United

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[1] *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 103 S.Ct. 3492 (1983) ("*Norris*").

[2] The Court of Appeals noted that historically the McCarran Act arose because of and was primarily intended to deal with the federal antitrust laws. It served the additional role of ensuring states of their traditional role in relation to insurance regulation (28a). The court in no way made the suggestion imputed to it.

States and for those decades their pension plans have been the pension plans and part of the terms and conditions of employment of the professors and certain other employees of institutions of higher education.

Now, about 3,000 institutions and several hundred thousand faculty and other employees have the pension plans as an integral part of their employment arrangement (13a).[3] In the case of respondents Long Island University ("LIU") and Spirt, participation in the plans has been mandatory (36a, 57a), and the plans are admitted to be a fringe benefit (JA216), to relate to Spirt's terms and conditions of employment (JA216) and, as such, to be subject to the collective bargaining agreement and to negotiations between the duly certified bargaining representative and LIU (JA216).

On April 15, 1974, the plans had been under challenge in this action for ten years, and TIAA-CREF finally have had to forego their discrimination against female participants which resulted from the use of sexually segregated annuity tables ("unisex tables").

On July 6, 1983, this Court delivered its opinion in *Norris*. At the same time, the Court granted the Petition for Certiorari filed in this action by TIAA-CREF,[4] from the September 29, 1982 judgment of the Court of Appeals, Second Circuit, and remanded it "for further consideration in light of" *Norris*. 103 S.Ct. 3565, 3566 (1983).

Immediately upon remand and in July, 1983, respondent Spirt filed a motion in the Court of Appeals for

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[3] Citations to material in the Appendix filed by petitioners appear as "____a" and material in the Joint Appendix filed below appear as "JA ____."

[4] Spirt did not object to that petition and joined in the request for expedition.

reinstatement of the prior opinion on the ground that the consideration ordered by this Court led to only one conclusion which was that the prior opinion of September 29, 1983 was in each and every respect fully in accord with *Norris* and in particular was in compliance with the duty to give sufficient attention to the equitable nature of retroactive relief and with the reasons and authority *Norris* stated for exercising equitable discretion as to retroactivity.

The record on consideration of the equitable factors is loud and clear. There is no impact on the funds, petitioners TIAA-CREF or respondent LIU, and the equitable considerations were taken into account as to *all* litigants and participants in the plans.

TIAA-CREF acknowledged that the liability issue was finally laid to rest by *Norris* (3a) and that their prospective use of segregated tables was barred. They urged, however, that the operative portions of the Opinion of September 29, 1982 could be reinstated only as to contributions paid into the plans prior to August 1, 1983, since, in the words of TIAA-CREF, *Norris* "barred" retroactivity. Thus, they urge that all funds they have received prior to that date are still subject to the discriminatory treatment. There is now conceded discrimination and liability (3a) but relief is said to be unavailable.

Thus, on remand the issue of retroactivity was again presented.

Careful consideration was given by the Court of Appeals, and the prior opinion was determined to comply with *Norris*, being modified only for the minor and irrelevent matter.

The action of respondent Long Island University ("LIU") and the Superintendent of Insurance for the State of New York ["Superintendent (NY)"] in the proceeding on remand is important.

The Court of Appeals stated in its first opinion that the Superintendent (NY) was "precluded from disapproving plans designed to conform with the order" and noted that the Superintendent (NY) indicated that he would comply with the final order of the Court (26a).[5] He filed no petition before this Court, took no step to challenge his preclusion and, shortly after the remand acting either within the scope of the statutory provisions of the State of New York or in full agreement that such laws have been preempted, has formally approved the elimination of the use of segregated tables from plans of TIAA-CREF and approved the prospective use of unisex tables.[6]

On remand in an *amicus curiae* brief (although a party to the proceeding and issues), the Superintendent (NY) represented that the future use of unisex tables did not in any way interfere with his regulation of the industry and that he could function in a manner which is consistent with and protective of plaintiff's rights under Title VII and other employee's contractual rights. Thus, while ignoring the holding of preemption by Title VII, the Superintendent (NY) clearly concedes that Title VII does not interfere with New York's regulation of insurance by anything in this action.

Respondent LIU, the common law employer of respondent Spirt, has not sought review of the second decision which TIAA-CREF petition to have reviewed. LIU took the position on remand that retroactivity was not ordered by the Supreme Court and the issue for the Court of

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[5] A Deputy Superintendent (NY) has recognized that federal jurisdiction applies to pensions in areas of discrimination and "they are beyond the reach" of the state regulators. Lamel, *State Regulation of Insurance Industry*, Ins. L. J. 336, 348 (1978).

[6] On prior occasions he approved unisex tables in proposals considered in connection with activities related to this action. (18a, 30a).

Appeals to decide was whether the relief it ordered was "appropriate in light of *Norris*." It contended that "*Norris* [had] also determined that all parties involved in the delivery of pension or deferred compensation benefits are governed by Title VII. Thus [it argued] Title VII applies to TIAA-CREF." (LIU's Brief on Remand, p. 3)

TIAA-CREF are now embarked on a procedure that could leave LIU alone, exposed to the full impact of the final judgment and injunction herein while they run to the side lines, taking their money with them, and continue segregated payments for all retirees after August 1, 1983 with respect to any contribution prior to that date. LIU could be compelled by the final judgment to pay the difference to females, and any success of TIAA-CREF on the escape points they seek to have reviewed would not alter LIU's responsibility.

After over 60 years for TIAA and 30 years for CREF, in service to colleges and universities and their employees and acting in relation to employees' benefit plans and their compensation, the two petitioners are turning from the institutions and participants and the only treatment of all employee-participants which the Court of Appeals has found under *Norris* was fair and equitable to all employee-participants and would not cost the fund one cent.

REASONS FOR DENYING THE WRIT

I. *NORRIS* DID NOT "SQUARELY REJECT RETROACTIVITY"

Petitioners claim that "*Norris* squarely rejects retroactivity." (Pet. 10)

Thus, petitioners conclude that Title VII has in effect been amended and that certain rulings in the decisions in *Albemarle Paper Co.* v. *Moody*, 442 U.S. 405 (1975) and

City of Los Angeles Dep't of Water & Power v. *Manhart*, 435 U.S. 702 (1978) were overturned by *Norris*.

Albermarle declared the strong presumption in favor of retroactivity of relief in Title VII actions (the "*Albemarle* Presumption"). *Manhart* recognized those statements, stated that such *Albemarle* Presumption could "seldom be overcome" (435 U.S. at 719), and acted in ordering prospective relief "without qualifying the force of the *Albemarle* Presumption in favor of retroactive relief" (435 U.S. at 724). However, the facts in *Manhart* showed that a substantial financial harm would result to the plan and its funds from the retroactive relief ordered by the lower court. The funds of the plan would be placed in jeopardy, or the plan could be bankrupt by paying the relief ordered.[7] The opinions of Justice Powell and Justice O'Connor agree that these dire consequences were the persuasive point in *Manhart* and concluded that the dire consequences flowing from the required payment accounted for the result and, consequently, led to the *Norris* conclusion.

Taking into account that the lower court in *Spirt* not only does not require "topping up" but equalizes the benefits of males and females at an actuarial new point between segregated benefits, the conclusion is inescapable that in terms of dollars to the plans the results of the *Manhart-Norris-Spirt* judgments are the same—no dollar cost to the particular defendants or plans.

Not one of the nine Justices in *Norris* interpreted *Manhart* as petitioners have; rather *Norris* and its application

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[7] Note should be made that in *Norris* Justice O'Connor points out that *Manhart* did not condemn all retroactive payments (refunds) in that case to women, and retroactive payments could be considered on remand, citing *Manhart*, 435 U.S. at 720, n.36. 103 S.Ct. at 3512, n.4.

of *Manhart* teach that retroactivity is not "squarely rejected." In light of the findings of fact on the equities involved, the relief should be left in place and the petition denied.

Norris Opinions

Respondent submits that there is a consensus that can be found in *Norris* in the reasoning of the separate opinions that retroactivity is proper here.

Justice Powell's Opinion

In writing for the majority on the point, Justice Powell indicated that although *Manhart* recognized that *retroactivity of* relief is normal in Title VII cases (*Albemarle* Presumption), the granting of retroactive relief on the *Norris* facts would be an abuse of discretion, since such facts revealed that the cost of retroactivity would have "devastating results." That result flowed not only from the "topping up" required by the lower court but also from such "topping up" to the artifically higher, segregated male level derived from use of the outlawed mortality tables.

Justice Powell agreed with Justice Marshall (writing for the dissent, *infra*) that the relief awarded in *Norris* was retroactive in requiring that contributions for women be "topped up" upon retirement in order that equal benefits would result at the male level calculated under the male segregated tables. Justice Powell points out (103 S.Ct. at 3510, fn. 10) that:

> "In order to provide women with the higher level or periodic payments ordered by the District Court, the State of Arizona [employer] would be required to fund retroactively the deficiency in past contributions made by its women retirees."

He mentions in fn. 11 *(id.)* the three factors bearing on the added cost of equalizing benefits to females to the higher level paid males:

> "The cost to employers of equalizing benefits varies according to three factors: (i) whether the plan is a defined contribution or a defined benefit plan; (ii) whether benefits are to be equalized retroactively or prospectively; and (iii) whether the insurer may reallocate resources between men and women by applying unisex rates to existing reserves or must top up women's benefits. The figures in text assume, as the District Court appeared to hold, see 486 F. Supp. 645, 652, that employers would be required to top up women's benefits."

In Spirt, the third factor, reallocation of resources by using unisex tables with existing reserves, was the method used. The first and second factors play no role in this case in considering impact;[*] consequently, there is no cost to defendants, TIAA-CREF or LIU. Furthermore, no "topping up" is required by TIAA-CREF or LIU and unisexing is simply applied to reallocate the existing funds.

TIAA-CREF very neatly distort Justice Powell's words and reasoning by quoting (Pet. p. 7) the phrase "both unprecedented and manifestly unjust", and by omitting his reference and limitation of his statement to the *Norris* "award", they improperly suggest that the phrase applies to all retroactivity. They ignore his analysis of the record and the threats of insolvency to the plan and jeopardy to the benefits which would cause manifest unjustice. Any such facts are foreign to the present record and do not exist.

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[*] TIAA-CREF plans are defined contribution plans (benefits based on amount actually received for each participant) as opposed to a defined benefits program, and no current retirees for equalization, retroactive or prospective, are involved in *Spirt;* it is limited to deferred annuitants.

Justice O'Connor's Opinion

Justice O'Connor concurred with Justice Powell's conclusion on relief. She relied on the *Manhart* Principle as being dispositive of the *Norris* case both on the issue of liability and the issue of relief. As to the relief and *Manhart*, she wrote:

> "Ultimately, I find this case controlled by the same principles of Title VII articulated by the Court in *Manhart*." (103 S.Ct. at 3512)

In dealing with *Manhart* and retroactivity, she cited the three criteria set forth in *Chevron Oil Co.* v. *Huron*, 404 U.S. 97, 105-107 (1971) for determining when to limit the retroactive application of a decision on statutory interpretation, although ultimately, she rested on *Manhart*. The three criteria are:

> *First criteria*—either a new principle of law is declared by overruling clear past precedent or by deciding an issue of first impression not clearly foreshadowed.[9]
>
> *Second criteria*—whether the operation of the statute be furthered or retarded by retroactive application.[10]
>
> *Third criteria*—will "inequitable results" be imposed by retroactive application. (103 S.Ct. at 3512)

Contrary to the assertion of TIAA-CREF (Pet., p. 14, fn. 6), the first and second criteria were actually non-points and present no barrier here; the third point of

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[9] The outcome of this action was foreshadowed by activities as early as 1973, by the filing of this action in 1974, and by the stream of activities thereafter. *See*, First (31a-36a) and Second (9a) Opinions of the Court of Appeals.

[10] The denial of retroactivity under the circumstances "would fly in the face of Title VII" (37a); Title VII would be substantially retarded.

unequitable results was persuasive to Justice O'Connor since the entire *Norris* plan could be jeopardized by requiring the additional "topping up" payment from the employer, reserves would be endangered and bankruptcy could ensue. In brilliant contrast to the *Norris* facts, the following references by Justice O'Connor (103 S.Ct. at 3512) concerning the third criteria are satisfied by *Spirt:*

> (1) "[T]he existence of adequate reserves to fund these pensions" lacking in *Norris* continue unaltered in *Spirt.*
>
> (2) No requirement is imposed that TIAA-CREF "must disburse greater annuity benefits than the collected contributions can support [which] would jeopardize the entire pension fund." TIAA-CREF's cash flow is unaltered.
>
> (3) "The fund [of TIAA-CREF] can . . . meet its obligations."
>
> (4) There is no "real danger of bankrupting the pension" fund.

Justice Marshall's Dissenting Opinion On Relief

Justice Marshall, writing for the dissent on relief, set out the broadest rules for retroactivity and concluded that the facts and the rulings in *Manhart* and *Albemarle Paper* controlled to make past contributions subject to relief. He would, however, have required a further review by the lower court on points not present here.

In emphasizing the *Manhart* principle and the *Albemarle* Presumption, the teaching of *Norris* leaves the answer on retroactivity to be found in the *Spirt* record and to be based on the exercise of discretion with sufficient attention being given to equitable considerations of that record. The Court of Appeals on remand, after again examining all aspects of the impact, concluded:

> "After a careful consideration of the majority opinion in *Norris* on the issue of relief, we conclude that the Court did not intend to bar retroactivity in the circumstances of this case" (7a).

Now, TIAA-CREF seek to march backward and attempt to have points reviewed which were long disposed of. And, they again pick up the cudgel for the males, suggest males are simply innocent, third-party bystanders, and proceed to ask protection of the use of segregated, discriminatory sex tables for males and *against* females for Pre-August, 1983 contributions. TIAA-CREF are thus artifically dividing the pensions of employees who have contributed before and after August, 1983 partly into discriminatory benefits and partly into complying equitable benefits. TIAA-CREF are also repeating the old canard that females are attempting without precedent and with manifest unjustice to take vested money from the males, which, according to TIAA-CREF is "an invasion of men's benefits contrary to contractual commitment" (Pet., p. 14).[11] The *individual* females who have been victimized in the past are unfairly and inaccurately made out to be the plunderers; whereas, under the use of segregated tables individual males are subsidized by and receive funds legally belonging to the individual females. TIAA-CREF, presumably disinterested trustees, refuse to accept the fact that they are required to give equitable consideration to *all* participants.

The point as to males presented in the Petition condenses arguments dating back to 1974 in this action which have been answered by every decision in this action since then. It is a reargument that "actuarial equality" and the

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[11] Any "invasion" is directed at illegal benefits and three lower court decisions rule there was no commitment or understanding and none is cited.

use of sex and age were a commitment forever locked in for males before August, 1983. TIAA-CREF argue that the unfair and inequitable conditions for females must remain in place as a windfall for males who would continue being subsidized in future retirements from females' pre-August, 1983 contributions for 40 or so more years.

The Court of Appeals after its review in light of *Norris* left its "assessment of the equity . . . unaltered" (9a) and affirmed its prior conclusions that there was no commitment to males and no understanding or reliance by them (31a-36a). Rather, as early as 1972 and 1973 reliance was "unjustified in light of the visibility [to males] of the issue of legality of using such [segregated] tables" and the conclusion as to windfall and subsidy was also clear from those years.

In September, 1972 TIAA-CREF advised all participants:

> "How much if any, all this ['unlawful practice . . . which differentiates in benefits on the basis of sex'] will be deemed unlawful employment practice [under Title VII] is for the EEOC and Courts to decide." (JA111)

Then the July, 1973 periodical to participants issued by TIAA-CREF referred to complaints already filed by females against institutions which charged discrimination by reason of the plans and challenged the system (JA477). The periodical concluded that matters were yet to be resolved, "probably in the Courts" (JA483). In 1974, in response to the Secretary of Labor's request for comments on sex discrimination guidelines, TIAA-CREF wrote encouraging opposition (33a). That same year this action was filed.

The Court of Appeals reviewed these and other facts and found that the possibility of a declaration of illegality and injunction "was foreseeable at least since 1974" (33a).

A further point to consider is that females since the early 1970s have held expectations that the discrimination was illegal and would be eliminated. The road was long but hope persisted that equity would prevail and the individual female would be treated no differently from the individual male.

Notice to all participants—male and female—existed that the expectations were being pressed in every forum and that the plans were exposed to a finding that illegal payments were involved.

No commitment to males for continuation of the illegal results can be implied. The discussions by the Court of Appeals in its Opinions are the best answer to such suggestions (8a-9a and 31a-37a).[12] Finally, in comparing *reasonable* expectations, this Court may contrast, on the one hand, the written notices all participants, *including males*, received from TIAA-CREF in 1972 and 1973 that the plan had been challenged by females as discriminatory by the filing of charges with the EEOC which was followed by the complaint herein then others with, on the other hand, the fact and rulings of illegality and the expectation of females that a "unisex" system was required and at some point in time would be in place.

II. TIAA-CREF ARE NOT GRANTED IMMUNITY FROM TITLE VII BY THE McCARRAN-FERGUSON ACT

The McCarran Act has not become the equivalent of a constitutional clause. *Cooper* v. *General Dynamics*, 533 F.2d 163, 169, *reh. en banc den.*, 537 F.2d 1143 (5th Cir. 1976), *cert. den. sub. nom., International Association of*

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[12] The District Court was more explicit; it concluded that the relief ordered would "avoid any question of the impairment of the contract rights of male participants," (87a) and considered the contract point further on reargument (90a).

Machinists, etc. v. *Hopkins*, 433 U.S. 408 (1977). More recently in *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 225-27 (1979) *("Royal Drug")*, this Court indicated "business of insurance" was to be narrowly construed because "Congress did not intend the business of insurance to be *broader* than it commonly understood meaning [and] the *contemporaneous* perceptions were highly significant in ascertaining congressional *intent*." (emphasis added)

The Court of Appeals considered the impact of the McCarran Act (25a). So, apparently, has the Superintendent (NY) who finds his activities unimpeded by *Spirt*.

The fact is that after a careful analysis the Court of Appeals in this action concluded:

> "We hold, therefore, that Title VII explicitly preempts New York Insurance laws to the extent that they 'require or permit' a method of calculating pension benefits that we have found to be 'an unlawful employment practice' under Title VII. Therefore, the McCarran Act does not exempt TIAA[13] from complying with the dictates to Title VII. Having so held, we need not reach the question whether application of Title VII will invalidate, impair, or supersede New York State Insurance law. (30a) (fn. added).
>
> "It is to be noted, however, that although the State Superintendent of Insurance has approved two sets of proposed unisex mortality tables for calculation of benefits based on contributions made after the date the new plans are approved, he has indicated that he will not aprove such tables for use in calculating benefits based on contributions made prior to the

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[13] CREF was dealt with separately (26a-27a). The Court of Appeals agreed with the District Court and, in particular, relied on *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959).

> effective date of the new plans. Obviously, our holding that Title VII pre-empts state insurance law with which it conflicts dictates that where the relief ordered necessarily has an impact on contributions paid to TIAA and CREF prior to the effective date of our order, the New York State Superintendent of Insurance will be precluded from disapproving plans designed to conform with the order." (30a)

Based on representations to it by the Superintendent (NY), the Court of Appeals went on to say in fn. 10:

> "We note that the Superintendent has indicated that he will, of course, comply with a final order of this Court." (30a)

TIAA-CREF in their Petition in Question 3 represented that the Court of Appeals limited the McCarran Act, "in effect, only to federal antitrust legislation" and in the text represent that McCarran Act was "essentially limited" by that Court to federal antitrust disputes. (18a) Both statements are wrong. While the lower court found the historical fact that the McCarran Act came about in direct reaction to *United States* v. *South-Eastern Underwriters Assoc.*, 322 U.S. 533 (1944), Congress' purpose was expressly found to be much broader. However, even though the lower court held there was preemption it found that there was no Congressional intent to declare subsequently enacted civil rights legislation inapplicable to any or all insurance company activities classified as the business of insurance. Furthermore, the McCarran Act did not render Title VII inapplicable to employment-related pension plans. (28a)

Respondent Spirt presents five other distinct reasons as back-ups to preemption for rejecting the attempt to seek review and to establish the McCarran Act as a basis for immunizing the discriminatory annuities of petitioners from Title VII; in addition, consequences for equita-

ble considerations result from the attempt by TIAA-CREF to walk away from its responsibility to the institutions which they were created to serve and which have implanted the plans into the terms an conditions of employment and use such rules as part of the compensation to their employees. TIAA-CREF would leave such institutions facing the responsibility alone.

The five other points are as follows:

(1) ERISA Causes Title VII To Preempt State Law As To TIAA-CREF

The Employee Retirement Income Securities Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, is a basis for preemption. The TIAA-CREF plans are regulated under ERISA and were submitted to and approved by it. The regulation of such plans has been established "as exclusively a federal concern." *Alessi* v. *Raybestos-Manhattan, Inc.*, ___ U.S. ___, 101 S.Ct. 1985, 1906 (1981).

The preemption provisions set forth in § 514(a) of ERISA, 29 U.S.C. § 1144, are broad in superseding "any and all state laws insofar as they now or hereafter relate" to a covered plan. Section 514(a) states that ERISA, except as provided in subsection (b), is not to be construed as exempting any person from any state law which regulated insurance, banking or securities; however, § 514(b)(2)(B) provides:

> "(B) Neither an employee benefit plan [such as the LIU-TIAA-CREF plan] described in section 4(a), which is not exempt under section 4(b) . . . , nor any trust established under such a plan, *shall be deemed to be an insurance company* or other insurer, bank, trust company, or investment company *or to be engaged in the business of insurance* or banking *for the purpose of any law of any State purporting to reg-*

> *ulate insurance companies, insurance contracts,* banks, trust companies, or investment companies." (Emphasis added)

The remarks in the Joint Explanatory Statement of the Committee of Conference reporting on this section explained that employee benefit plans are not to be considered insurance companies or in the business of insurance for purposes of any State laws that regulate such. H. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess., 1974 *U.S. Code Cong. and Adm. News* 5162. *See Marshall* v. *Chase Manhattan Bank*, 558 F.2d 680, 682 (2nd Cir. 1977).

(2) The McCarran Act By Its Express Terms Does Not Bar Preemption

McCarran Act does not affect the requirements and provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, ("FLSA") which is pleaded by plaintiffs as a jurisdictional basis for her claim (Amend. Compl. ¶ 1; JA140) and is part of the statutory basis of this action.

Certain specified defenses of the Equal Pay Act amendment, 29 U.S.C. § 206(d), to the FLSA, which are incorporated by the Bennett Amendment into Title VII [§ 703(h), 42 U.S.C. § 2000e-2(h)] have been unsuccessfully urged by TIAA-CREF in this and related actions.[14] *See*, District Court decision in this action, 475 F. Supp. at 1309 (73a-74a). And in their petition, the further question raised by TIAA-CREF as it was in the Court of Appeals (TIAA-CREF Brief, May 11, 1982, p. 41) is whether the Equal Pay Act also makes applicable the "good faith reliance" defense of the Portal-to-Portal Act, 29 U.S.C. § 251, which is also part of the FLSA (Pet., p.

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[14] *E.g., E.E.O.C.* v. *Colby College, et al.*, 589 F.2d 1139 (1st Cir. 1978).

15, n. 8). Thus, TIAA-CREF are urging selected sections of the FLSA, But they cannot winnow out the McCarran Act's express declaration that nothing in the FLSA:

> ". . . shall be construed to affect in any manner the application to the business of insurance of . . . the Fair Labor Standards Act. . . ." 15 U.S.C. § 1014.

TIAA-CREF have conceded in the lower court that the McCarran Act "does not bar the plaintiff's claims under the Fair Labor Standards Act [Equal Pay Act] . . . because the later Act is specifically exempted" from the McCarran Act. [TIAA-CREF Brief, Aug. 19, 1975 (fn., p. 39); DN21].

In view of the foregoing, the combined provisions of Title VII, the FLSA and the McCarran Act are congressional commands which are clear, and the McCarran Act by its terms is no obstacle to Title VII.

(3) In Their Pension Annuity Business Neither TIAA Nor CREF Can Claim That Title VII Does Not Apply. Superintendent (NY) Makes No Such Claim.

TIAA and CREF were created solely as an adjunct of and for service to the institutions such as defendant LIU and the 3,100 or so others with which they are so closely intertwined. The details of the interplay between the institution and TIAA-CREF are set forth in present record in reflecting the position of TIAA-CREF as the *alter ego* of LIU (and the others) in the area of retirement planning and pension benefits (JA172, Stip. of Facts, Nos. 3-9). TIA-CREF were organized to serve and fulfill this role principally on behalf of institutions of higher learning *(id.)*, and the McCarran Act should not be extended to immunize a large segment of pension benefits from federal statutes and to permit continued discrimination.

In *Royal Drug Co., supra*, this Court commented that "the primary concern of Congress in the wake of that decision *[South-Eastern Underwriters Assn]* was in enacting legislation that would ensure that the States would continue to have the ability to tax and regulate the business of insurance." In this respect, however, the Supreme Court pointed out:

> "There is no question that the primary purpose of the McCarran-Ferguson Act was to perserve state regulation of the activities of insurance companies, as it existed before the *South-Eastern Underwriters* case." (322 U.S., n. 18 at 218).

Accord: Virginia Academy of Clinical Psychologists v. *Blue Shield of Virginia*, 624 F.2d 476, 483 (4th Cir. 1980).

TIAA is in the fixed annuity pension business. This Court appropriately should consider that New York courts have held that an annuity is not insurance as generally understood, and the sale of annuity contracts falls outside of activities considered to be insurance. *In re Newton's Estate*, 177 Misc. 877, 32 N.Y.S.2d 473 (Surr. Westch, Co., 1941), *aff'd*, 267 App. Div. 913, 48 N.Y.S.2d 332 (2nd Dep't 1941), *aff'd*, 294 N.Y. 687, 60 N.E.2d 842 (1941); *in re Sothern's Estate*, 170 Misc. 805, 14 N.Y.S.2d 509 (Surr. Ct. Ulster Co. 1938), *aff'd*, 257 App. Div 574, 14 N.Y.S.2d 1 (3rd Dep't 1939); *in re Rhodes Estate*, 197 Misc. 212, 94 N.Y.S.2d 406 (Surr. Ct., Westch. Co., 1950). *See*, 1 Appleman *Insurance Law and Practice* § 84, pp. 295-99, ns. 1-6 for cases (rev. ed. 1981). Thus, these activities are not encompassed by the McCarran Act.

The Court may also consider the authority of Deputy Superintendent, New York State Insurance Department, who has recognized that in "insurance areas where discrimination is a problem, such as social security and pension benefits," federal jurisdiction applies and "they

are beyond the reach of state regulatory authority." Lamel, *State Regulation of the Insurance Industry*, Ins. L. J. 336, 348 (1978). The fact that the Superintendent of Insurance does not seek to review the *Spirt* decision and has announced that he will abide by the results and "honor the decision" is the latest recognition of the foregoing. This is actually a recognition of No. (1) *supra*, and the authority cited by the Court of Appeals in its September 29, 1982 opinion (28a-29a).

(4) TIAA-CREF Necessarily Join With Non-Exempt Person, Including LIU And Over 3,000 Participating Employers, And Has Forfeited Any Exemption It Might Have Had

TIAA-CREF are in lock step and jointly act with LIU and each of the 3,100 or so other non-exempt, participating institutions they serve (JA146; JA172). In *Royal Drug, supra*, this Court ruled that a company in the "business of insurance" combining with "parties wholly outside the insurance industry" for an unlawful purpose forfeits any right it might have to immunity under the McCarran Act. 441 U.S. at 231-232. Accordingly, TIAA-CREF have forfeited any right to claim protection from the McCarran Act. *Royal Drug, supra*, 441 U.S. at 231-233. *Cf., Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384 (1967) and *United States* v. *Borden Co.*, 308 U.S. 188 (1939) (agricultural cooperatives forfeit their immunity from the antitrust acts where they conspire with non-exempt parties); *Ramsey* v. *Mine Workers*, 401 U.S. 302, 313 (1971) and *Mine Workers* v. *Pennington*, 381 U.S. 657, 665-666 (1965) (unions forfeit their antitrust immunity where they conspire with non-exempt parties for the unlawful purpose of price fixing).

(5) Title VII May Be Construed Not To Supersede Any New York Law

The District Court held that the laws of the State of New York did not compel or encourage the discriminations (475 F. Supp. at 1312, 79a).

This ruling means that Title VII does not "invalidate, impair or supersede" any state law which is under the McCarran Act umbrella. In view of its holding on preemption, the Court of Appeals did not reach this question (30a). It observed that the Superintendent (NY) has acted to approve the future use of unisex mortality tables and that he would comply with the order entered.

See, *Norris* v. *Arizona*, 671 F.2d 330, 333 (9th Cir. 1982) which stated that the "district court has not interfered with the business of insurance." Title VII has not been construed so as to "supersede Arizona's laws." The court enjoined the use of the discriminatory tables and rejected the McCarran Act argument by concluding that all that had been done was to tell the employer [here LIU-TIAA-CREF] that it "may not offer a fringe benefit which treats an individual woman differently than an individual man."

III. TIAA-CREF ARE WITHIN THE TERM "EMPLOYER" AS DEFINED IN TITLE VII

The Court of Appeals sets forth the reasons TIAA-CREF are considered "employers" within the meaning of § 701(b) of Title VII, 42 U.S.C. § 2000e(b) which includes as employers a "person engaged in an industry affecting commerce . . . and any agent of such person." That definition ". . . is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' of an

aggrieved individual as that term has generally been defined at common law." (24a).

The reasoning of the Court of Appeals and the authorities for this conclusion are set forth in the September 29, 1982 opinion (24a). The Court agreed with the District Court that TIAA-CREF "exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees [and] are so closely intertwined with those universities [in this case LIU] that they must be deemed an 'employer' for purposes of Title VII." *(id.)* The lower court discussed the issue under "Definition of 'Employer' Under Title VII" (71a). The court found on the facts that authority, responsibility and control had been delegated to petitioners by LIU and they shared in such. They had been founded and existed solely to serve LIU and other institutions and to relieve institutions of the burden of establishing and administering the pension plans.

Manhart held two defendants in addition to plaintiffs' common law employer responsible [*Manhart*, 435 U.S. at 704, n.2; *see*, *Manhart*, 553 F.2d 581, 583 (9th Cir. 1976)]. Thus, the TIAA-CREF petition is in error (p. 17) in suggesting that *Manhart* was limited to common law relations. In fact, *Manhart* recognized that "Title VII and the Equal Pay Act *primarily* govern relations between employers and employees" (435 U.S. at 719, n.33, emphasis added), which is to say that Title VII applies to other than strict common law relations and is read in conjunction and harmony with the Equal Pay Act.

Manhart also compares the word "agent" in Title VII with the phrase "any person acting directly or indirectly in the interests of an employer in relation to an employee" in the Equal Pay Act, 29 U.S.C. § 206(d), in referring to

the defendants who were not direct, common law employers.[15]

This same language ("acting directly as an employer or indirectly in the interest of an employer in relation to an employee benefit plan") is found in ERISA, to which the plans at issue admittedly are subject. 29 U.S.C. § 1002(6). In this respect, *Lutcher* v. *Musical Union Local 47*, 633 F.2d 880 (9th Cir. 1980) cited and relied by the District Court holding on "employer," states "employment need not necessarily be direct" (at 883).

In the Court of Appeals decision in *Norris*, 671 F.2d 330 (9th Cir. 1982) the conclusion was made that the *Manhart* decision did not confine itself to employer operated funds or to the boundaries encompassing only direct activities of an employer. Certainly, if the plan falls within Title VII, the person operating it at least when "acting in the interest of an employer" in relation to "such plan, which is admitted to be a fringe benefit" and a term and condition of employment, also comes within Title VII.

> "The reasoning of *Manhart* is no less persuasive where, instead of operating a plan itself, an employer designated certain companies to operate the plan. In both cases, the plan offered by the company discriminates against women because it looks at them as a class instead of as individuals.
>
> "In addition, none of the cases subsequent to *Manhart* has found Title VII inapplicable because an employer-operated pension plan was not involved.

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[15] The Supreme Court in *Manhart* dealt with these words as covering the same point (p. 718, n. 33). TIAA-CREF in their *amicus curiae* to the Supreme Court in *Manhart* argued that the intent of Congress was to avoid two conflicting standards and any conflict should be resolved in favor of Equal Pay interpretations (TIAA-CREF Brief, pp. 31-32). Thus, the "directly or indirectly" acting test falls within the standard suggested by TIAA-CREF.

See Equal Employment Opportunity Com'n v. *Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Peters* v. *Wayne State University, supra; Spirt* v. *Tchrs. Ins. & Annuity Ass'n, supra.*

"Arizona attempts to distinguish these cases [all involving TIAA-CREF] by stating that those employers took an active role in administering or developing the plan. This distinction is illusory. In this case, as in the above cases, it is clear that the adoption of th plan constitutes active participation without which the challenged program could not operate. *See Colby, supra*, 589 F.2d at 1141; *Sobel* v. *Yeshiva University*, 477 F. Supp. 1161, 1166 n.4 (S.D.N.Y. 1979); *Spirt, supra*, 475 F. Supp. at 1308-09. Arizona made the selection of certain companies as funding media. It approved participation in the plan and deducted the appropriate amount from the employee's salary. The fact that the plan is operated by a private insurance company rather than Arizona does not render *Manhart* less controlling." (671 F.2d at 344)

TIAA-CREF are within the ambit of Title VII; any suggestions that they are not is a suggestion that Title VII, *Manhart* and *Norris* can be nullified as to pension plans and discrimination and would leave discrimination in the plans for another 30 to 40 years (34a).

CONCLUSION

Respondent Spirt urges that the petition for a writ of certiorari be denied.

Respectfully submitted,

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